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April 14, 1976.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6522

TABLE OF AUTHORITIES CITED

Cases	Page
Case-Swayne Co. Inc. v. Sunkist Growers, Inc., 389 U.S. 384 (1969)	6
Case-Swayne Co. Inc. v. Sunkist Growers, Inc., 355 F.Supp. 408 (C.D. Cal. 1971)	6
International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913 (9th Cir. 1975)	7
Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962)	6
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)	4, 6
United States v. American Tobacco Co., 221 U.S. 106 (1910)	4
United States v. E. I. Du Pont de Nemours & Co., 366 U.S. 316 (1961)	4, 5, 6

Statutes	
Clayton Act, Sec. 7	6
Clayton Act, Sec. 16	7
Sherman Act, Sec. 1	2
Sherman Act, Sec. 2	2, 6, 8
United States Code, Title 7, Secs. 291-292	5
United States Code, Title 15, Sec. 1	2
United States Code, Title 15, Sec. 2	2
United States Code, Title 15, Sec. 18	6
United States Code, Title 15, Sec. 26	7
United States Code, Title 15, Secs. 61-65	5

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1311

SUNKIST GROWERS, INC.,

Petitioner,

vs.

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION and M-C INTERNATIONAL, INC.,

Respondents.

BRIEF IN OPPOSITION.

The members of petitioner Pacific Coast Agricultural Export Association ("Association") and petitioner M-C International, Inc. ("M-C") are exporters of fresh fruits and vegetables to various foreign countries, including the Crown Colony of Hong Kong. Respondent Sunkist Growers, Inc. ("Sunkist") is a federated agricultural marketing cooperative, which provides its 8,500 citrus grower members in California and Arizona with sales facilities, engineering, research and entomological assistance, by-products processing and advertising, including the use of the Sunkist trademark. Sunkist sells oranges, lemons, grapefruit and their by-products throughout the United States, Canada, Europe and the Far East.[1]

[1]Sunkist has filed its own petition for certiorari (No. 75-1325) in which the facts of this case are set forth in greater detail.

FEED THROUGH

Prior to 1966, Sunkist marketed its oranges in Hong Kong through petitioners and other exporters located on the West Coast of the United States. Then, in response to severe competitive pressure from other orange producing countries, such as Israel, South Africa and Australia, Sunkist entered into an exclusive sales agency agreement with Hong Kong-based Reliance Commercial Enterprises, Inc. ("Reliance"),[2] and as a consequence stopped selling export oranges directly to petitioners.

Petitioners brought suit charging violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The jury found Sunkist (and in M-C's case, Reliance) had violated §§ 1 and 2, and in response to a special interrogatory concluded Sunkist had monopolized a market defined as "oranges grown in California and Arizona for export to Hong Kong."

Petitioners then requested the district court to order the *dissolution* of Sunkist. The district court rejected that prayer, stating:

> "For the reasons set out below, the Court holds that, even assuming arguendo that it has the power to award such relief [dissolution] to a private antitrust litigant, there has been no showing in this case which would justify, much less require, the extreme relief requested.
>
> * * *
>
> "Furthermore, this Court is aware of no case in which a private litigant, as opposed to the Government, has been awarded such relief [dissolution]. We need not reach that question here in

[2]Reliance was named as a defendant in the action brought by M-C, but it has indicated it has no interest in the outcome of the proceedings before the Court.

any event, since there has been no showing which would justify such relief in this case.

"The gravamen of plaintiffs' complaint in this action was that defendants had refused to sell them oranges, thereby cutting off their only source of supply, by the exclusive agreement with Reliance, and it is that condition which the Court has sought to cure in fashioning its equitable decree." (Petition, A39-40.)

The district court ordered Sunkist to end its exclusive arrangement with Reliance and to sell petitioners and other exporters oranges from either its domestic or export department.

On November 11, 1975, the court of appeals affirmed the district court's injunctive decree in full. (Petition, 24-25.)

1. On this record, it would be improvident for the Court to review the question presented by petitioners. As noted above, the district court recognized the "gravamen of plaintiffs' complaint in this action was that defendants had refused to sell them oranges." The district court sat through a nine-week trial and a hearing on injunctive relief and reviewed over 2,000 exhibits. It determined on that record that Sunkist's violations (accepting the jury's verdict that they occurred) were properly remedied by requiring Sunkist to sell oranges to the Association's members and other exporters, and structured its injunctive decree accordingly. Petitioners have presented no argument that the district court's decision on the facts of this case was erroneous or influenced in any way by the court's view of the availability of the remedy of dissolution. Indeed, the court twice in its opinion expressly assumed

BLEED THROUGH

that even if dissolution were available, petitioners had made "no showing" they were entitled to such drastic relief. Therefore, however this Court might decide the question of the availability of dissolution, it would in no way affect the outcome of this case. Petitioners' problem is with the facts, not the law.

2. To grant such sweeping relief where lesser relief will do would be to ignore the Court's own guidelines that dissolution is not to be used unless no other, less harsh, form of relief will suffice. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951). It would also fail to give proper regard "for the vast interests of private property which may have become vested in many persons . . . without any guilty knowledge or intent in any way to become actors or participants in the wrongs . . . ." *United States v. E. I. Du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961), quoting *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1910).

It is clear that dissolution of Sunkist would be exceedingly harsh for Sunkist members. It would be disastrous, if not altogether destructive of their businesses—all to provide a remedy that petitioners could not possibly demonstrate is necessary. For example, dissolution would deprive the members of the use of the "Sunkist" trademark, which has been a highly prized symbol of premium quality citrus fruit in the United States and abroad. Sunkist sales offices in the United States and overseas would have to be broken up. The processing plants now used to make juice and citrus by-products would have to be disposed of.

3. The failure of petitioners to face these issues also argues strongly against giving such a powerful

weapon as dissolution to any private party, who may wield it to advance its own selfish interests rather than those of the public at large. Here the obvious purpose of petitioners is to eliminate Sunkist as petitioners' only significant competition in the sale of oranges to Hong Kong. The Association, because it is organized under the Webb-Pomerene Act (15 U.S.C. §§ 61-65), sets a uniform markup for its members, and those markups are regularly followed by nonmember exporters. Only Sunkist's agent Reliance sets a different —and lower—markup. It is not surprising, therefore, that petitioners wish Sunkist dissolved.

4. If dissolution were ever appropriate in any case, it would be directed toward a situation where "the heart of the conspiracy is the combination itself." *United States v. E. I. Du Pont de Nemours & Co., supra,* 366 U.S. at 329. This is simply not true here. In this case, dissolution of Sunkist would have as its primary effect the complete restructuring of the market made up of the producers of citrus fruits in California and Arizona, or the supply market. Petitioners do not compete with Sunkist in the supply market, but only in the distribution of oranges to Hong Kong, which is a different market. Therefore, the voluntary association of producers in an agricultural cooperative is irrelevant to the alleged conspiracy; dissolution of the cooperative would have only a collateral effect in the market allegedly monopolized and thus would be excessive and punitive.

Moreover, dissolution would deprive Sunkist's members of their rights under the Capper-Volstead Act (7 U.S.C. §§ 291-292) to join together to market their products exempt from the antitrust laws even

though the court of appeals below specifically recognized that the voluntary association of producers in the cooperative was protected under Capper-Volstead. (Petition, A-10.)[3]

5. Not only do the facts of this case fail to raise the question of the availability of dissolution to a private antitrust plaintiff, there is no conflict in the circuits on the question. In the cases cited by petitioners (Petition, 6-8), the question has been in terms of a *divestiture* of units found to be illegally acquired under § 7 of the Clayton Act (15 U.S.C. § 18). This case deals with total dissolution for an alleged violation of § 2 of the Sherman Act. There is a clear distinction between these remedies. Divestiture is to be "in the forefront of a court's mind" in a § 7 case, *United States v. E. I. Du Pont de Nemours & Co., supra,* 366 U.S. at 331, whereas dissolution is not to be used unless no other, less harsh form of relief will suffice. *Timken Roller Bearing Co. v. United States, supra,* 341 U.S. at 603. This obvious difference between the two remedies indicates that the Court will rarely face the issue of dissolution;

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[3]In *Case-Swayne Co. Inc. v. Sunkist Growers, Inc.,* 389 U.S. 384 (1969), the Court found Sunkist as then organized not in technical compliance with the Capper-Volstead Act, but it has since reorganized to remedy the situation. *Case-Swayne Co. Inc. v. Sunkist Growers, Inc.,* 355 F.Supp. 408 (C.D. Cal. 1971).

Petitioners' allegation that Sunkist is "an habitual violator of the antitrust laws" and a "recidivist" in antitrust terms (Petition, 5 and n. 1) may be high drama but is based on a mischaracterization of the cited cases, including *Case-Swayne*. Compare petitioners' characterization of *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 29-30 (1962) (Petition, 5, n. 1) and the Court's actual holding in that case. Moreover, these contentions were argued to the district court and rejected. In all events, the allegation is irrelevant to the Petition.

it should reject petitioners' efforts to obscure the distinction and create a false conflict. If there is a difference among the circuits on the issue of divestiture, a divestiture case rather than a dissolution case should be taken to resolve that conflict.

6. The Association does not have standing to seek any injunctive relief whatsoever, much less dissolution. It is a party to this case solely because it is the assignee of the claims of its members; the Association itself conducts no business and is therefore not a person threatened by a violation of the antitrust laws on whom § 16 of the Clayton Act (15 U.S.C. § 26) confers standing to seek injunctive relief. See Sunkist Petition for Certiorari (No. 75-1325), pp. 23-25.

7. Sunkist has not here attempted to address in any material way the issue of whether in the abstract the remedy of dissolution should be available to a private party. However, Sunkist believes a full briefing of the issue would demonstrate a private party is not, and should not be, allowed to seek dissolution in an antitrust case. *Cf. International T. & T. Corp. v. General T. & E. Corp.*, 518 F.2d 913 (9th Cir. 1975).

8. Finally, Sunkist wishes to point out that petitioners' statements in this instance should be considered when reviewing Sunkist's own petition for certiorari (No. 75-1325). Nowhere in the petition is there a definition of the market which Sunkist has allegedly monopolized. As noted above, dissolution might be considered appropriate if, and only if, the monopolization were in the supply market, where the combination

of Sunkist's growers into a cooperative has its obvious, primary impact. The Ninth Circuit considered any such claim of monopolization of the supply market on the facts of this case as "absurd." (Petition, A-10.)

Sunkist agrees it is "absurd," but the record shows that petitioners relied on Sunkist's 70-75% share of the California-Arizona supply of oranges to lead the jury into believing that that market share was the relevant one to be used in determining liability under § 2 of the Sherman Act. A careful reading of the market definition on which petitioners relied, "oranges grown in California and Arizona for export to Hong Kong," shows it refers the jury to the supply market. This reference was not an inadvertent error. Only if petitioners had a verdict in hand which referred to the supply market could they go to the court with their request for dissolution; a verdict limited to the distribution market would hardly be a compelling reason for such drastic relief. Moreover, if petitioners had to rely on Sunkist's 45-62% share of the distribution market, they knew they would have had a more difficult, and Sunkist submits legally impossible, task of proving monopolization. The Ninth Circuit should have recognized the jury was misled, that it was focused on the wrong market when considering the § 2 claim, and that the § 2 verdict should have been reversed for legally insufficient evidence. Instead the Ninth Circuit affirmed the § 2 verdict, relying on Sunkist's status in the distribution market. Because these facts do not constitute legally sufficient grounds for a finding

of monopolization, Sunkist has sought review of that part, among others, of the opinion of the court of appeals.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari sought by the Association and M-C should be denied.

Respectfully submitted,

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April 14, 1976.